Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL TENNER,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Mississippi

PETITION FOR WRIT OF CERTIORARI

T. JACKSON LYONS
Standard Life Building
206 West Pearl Street, Suite 711
Jackson, Mississippi 39201
Tel. (601) 352-0330
Fax (601) 969-1402
MSB #8988
Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

53 pp

QUESTIONS PRESENTED FOR REVIEW

I. Does a criminal defendant have a right, under the Confrontation Clause, to cross-examine the State's informant, and only eyewitness, about whether the informant had committed prior uncharged acts to show the witness had a motive to give testimony favoring the prosecution?

II. Were the Petitioner's rights to due process and confrontation violated when the Mississippi Court of Appeals relied on a hearsay confession in affirming the jury's verdict where the hearsay confession came out at a *post-trial* hearing?

PARTIES

All parties appear in the caption. Petitioner will be referred to by his name, "Tenner"; Respondent will be referred to as "the State."

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CITATION TO OPINION

The Court of Appeals of Mississippi ordered that its opinion not be published. The style of the case was *Tenner v. State*, No. 96-KA-00930-COA (September 29, 1998). The opinion is reproduced in the Appendix. The Court of Appeals' order denying rehearing and the Supreme Court of Mississippi's order denying the petition for a writ of certiorari are also reproduced there.

JURISDICTION

The Court has jurisdiction of the case pursuant to 28 U.S.C. § 1257, as amended. This case was assigned by the Supreme Court of Mississippi to the Mississippi Court of Appeals on January 26, 1998. That Court handed down its decision on September 29, 1998. Tenner's request for rehearing was denied on February 9, 1999. The Supreme Court of Mississippi declined review on May 13, 1999. The Petition is timely filed on or before August 11, 1999.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The confrontation clause was applied to the States in *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1968).

The Fourteenth Amendment provides that no state " . . . shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

Michael Tenner was indicted for a sale of cocaine to James "Judge" Ellis on November 17, 1995, in violation of Miss. Code Ann. § 41-29-139. (C.P.[1] 3) After pleading not guilty, Tenner, with no prior police record, was tried, convicted and sentenced to thirty years. (T. 184, C.P. 105) Subsequent to the trial, the State's informant and only eyewitness, Ellis, recanted his identification of Tenner as the seller. Tenner's request for a new trial on that basis was denied. (C.P. 122)

Late on the evening of November 17, 1995, the Jefferson County Sheriff, his deputies, and agents of the Mississippi Bureau of Narcotics, along with Ellis, met to execute a drug purchase. (T. 96-97) Ellis previously had been convicted of selling cocaine and had received an eight year sentence. (T. 74)

Ellis was sixty-nine or seventy years old. (T. 146) Asked at trial how he came to be working for law enforcement, Ellis said, "They had asked me, you know, would I help them or something like that." (T. 94) Narcotics Agent Kenny Cotton testified that Ellis had become a confidential informant "for no gain. I couldn't offer him anything. He basically did it for the community. He – he volunteered – well, he and I had talked about it a couple of times, you know, because I couldn't offer him anything. The judge had already sentenced him." (T. 118)

Asked whether he had already been convicted when law enforcement officials asked him to be an informant,

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[1] References to the transcript pages will be in the format of "T." followed by the page number; Mississippi's practice is to refer to pleadings volumes as "Clerk's Papers," or "C.P." followed by the page number.

he responded: "Well, they had, you know, been – no – yes, I was. I had been convicted." (T. 94) As he later explained at the hearing on the new trial motion,

> they had been working that deal a long time ago, way before [the conviction], night and day. So I'm telling you just like it is. And they told me, said that if I do that for them they would get me out of it.

(T. 252)

On cross-examination, Ellis was asked how many times he had sold cocaine in Jefferson County. The District Attorney's objection was sustained. (T. 80) At a sidebar following that ruling, Tenner's lawyer explained:

> MR. McGEHEE: I would like to find out what this relationship is [between Ellis and the State]. Also, I think it's very relevant how many time (sic) he sold cocaine in Jefferson County versus how many times he was indicted and the charges he pled guilty to.
>
> THE COURT: I've already sustained that objection.

(T. 81) Tenner wished to inquire into Ellis' history and whether the State was graciously declining other prosecutions to reinforce Ellis' volunteer spirit.

The Bureau of Narcotics agent, Cotton, had given Ellis three one hundred dollar bills with which to make the buy. (T. 97) Ellis drove to a country store owned by Tenner's mother and made the purchase. (T. 100, 190) According to Ellis, he arrived at the store at about 10:00 p.m.; he said there was light coming from the store windows and "yard light" from nearby houses. Ellis stopped twenty-five feet from the store to be met by a man he identified as Tenner. (T. 83-84)

Ellis then drove a short distance to rendezvous with Agent Cotton and surrender the cocaine purportedly

received from Tenner. (T. 101, 70) After driving to the store, Cotton asked a man outside the store, Michael's brother, Roosevelt Tenner, if Michael was there. (T. 103, 168) Michael, a friend, David Buckles, and Michael's other brothers, Charles, Cornelius, and Will, emerged from the store. Ellis had testified he saw no one else outside except Michael, "I didn't see [anyone else]. I pay no attention to anybody." (T. 84)

Later that evening, Ellis related his story to Cotton for the Bureau's report. At trial, Ellis said he looked at the report, "but I didn't read it because I can't – my eyes are bad, and I can't see nothing, you know." (T. 86, 89) Cotton was aware of Ellis' bad eyesight, admitting that Ellis had not actually read the report. (T. 139)

Tenner was searched but no drugs were found. (T. 134) The Bureau did not bother to conduct skin or clothing tests for traces of drugs. Cotton admitted that such tests were available. (T. 134) No law enforcement official searched the store.

Cotton found in Tenner's possession over six hundred dollars in U.S. currency. (T. 105, 135) Tenner told Cotton that the money was from making payroll for the trucking company owned by him and his four brothers. (T. 105) Documentary evidence established the fact that Tenner had withdrawn cash to make payroll; that was the reason all five brothers were present. (Exhibit D-5, T. 185) Three hundred dollar bills were those given to "Judge" Ellis. (T. 105-06)

Tenner's friend, David Buckles, the only eyewitness not a member of the Tenner family and not a law enforcement agent, testified that Michael did not leave the store between about 8:45 p.m. and when the Sheriff arrived at about 10:00 p.m. (T. 203) Roosevelt Tenner admitted that

he, not Michael, had received the money from Ellis, but denied selling Ellis cocaine. (T. 167, 171) Roosevelt said that after his transaction with Ellis he went into the store. Cornelius asked him to buy a six-pack. (T. 154, 167) Roosevelt had only the large bills received from Ellis. Buckles and Michael's brothers testified that Michael made change for Roosevelt receiving in return the State's currency. (T. 155, 167-68, 188-89, 203)

Just before trial, Ellis called one of Tenner's attorneys, Bobby Lamar Cox, at Cox's home. During that conversation, Ellis stated he would not testify against Michael Tenner. At trial Ellis denied calling Cox. (T. 93) Cox then testified that Ellis had lied. (T. 213-14) Receiving the case at 6:30 p.m. on July 3, 1996, the jury returned a guilty verdict later that evening. (T. 240; C.P. 105)

At the evidentiary hearing on Tenner's motion for a new trial, Ellis admitted he had called Cox prior to trial. Ellis said his denial at trial was motivated by fear. (T. 250) Ellis recanted his identification of Michael Tenner as the seller:

> A. No, I don't [know who sold the cocaine]. Because see, it was so quick and what it was – I had – they gave me two shots in this eye, and one – and when nighttime come, a car light be giving off a spark. And I really just can't see too good at night.

(T. 251) Ellis said that he testified against Tenner even though he could not be sure from whom he made the buy because he was afraid of the prosecutor or the "narks":

> A. Well, see, what it was, I been dealing with a bunch of them narks, and I really don't know who all it was. It was a gang of them. This thing had been going on a long time. That's why they wired me up from the gitgo. And this had

> been going on way before they got ready to try me. And the deal – what it was, at the same time they suppose to get me out of this mess. Now, that's how I got involved.

(T. 261)

Tenner raised three issues on appeal, including a claim that the trial court's refusing to allow his inquiry into Ellis' prior drug sales impermissibly curtailed his right to confront the witness. (App. 4-5) About the Sixth Amendment issue, the Mississippi Court of Appeals said, in relevant part:

> Any alleged curtailment by the trial court affecting or limiting Tenner's inquiry into Ellis's relationship with law enforcement is unsupported by the record. *In addition, we are not persuaded that additional inquiry by Tenner would have produced substantial interest, motive, or bias not already established.*
>
> . . . A careful review of the record reveals that the jury was more than amply aware of any potential bias, motive, or interest Ellis may have harbored. *It was presented to the jury that Ellis was a convicted felon presently incarcerated . . . for the sale of cocaine and that he was a confidential informant for the Mississippi Bureau of Narcotics. . . .*

(App. 11-12) (emphasis supplied)

This case has one additional twist. At the post-trial motion hearing, the following direct examination occurred between the State's drug agent, Kenny Cotton, and the prosecutor:

> Q. Now, in terms of the way that the drugs were purchased on that particular night, November 17th of 1995. Whose idea was it to buy from Michael Tenner?

A. The idea was initiated from Judge Ellis. That's where the idea come from.

Q. Okay. And the basis being?

A. Excuse me?

Q. Well, I mean, what was the basis of it all?

A. To buy drugs from Michael Tenner, who Judge [Ellis] told me that he was getting his drugs from. And not only Michael Tenner, there were others – well, one other that he talked about.

(T. 281)

In the context of the post-trial motion, Tenner's counsel elected not to object to Cotton's hearsay statement about Ellis' "confessing" he had dealt drugs with Michael Tenner. Tenner's counsel did not expect Mississippi's Court of Appeals to make the following finding:

> During the evening hours of November 17, 1995, members of the Jefferson County Sheriff's Office and the Mississippi Bureau of Narcotics conducted an undercover "buy" of a controlled substance from Michael Tenner. James Ellis, a confidential informant, met with Sergeant James [Kenny] Cotton of the Mississippi Bureau of Narcotics at a staging area in the Tennerville community in Jefferson County just prior to the "buy." . . . *Previous information given by Ellis indicated that Ellis had purchased cocaine from Tenner before and that Tenner was Ellis's supplier.*

(App. 5) (emphasis supplied)

Considering it beyond an appellate court's jurisdiction to rely on hearsay testimony amounting to a confession coming out during a post-trial motion hearing to support the jury's verdict, Tenner's motion for rehearing objected:

> That the Court prefers to leave the jury verdict alone, even with the recantation, may have to do with the purported fact that "[p]revious information given by Ellis indicated that Ellis had purchased cocaine from Tenner before and that Tenner was Ellis's supplier." Slip op. at 2. The Court states this purported fact not based on what the jury heard, but on Kenny Cotton's incompetent hearsay testimony. . . . That this sort of speculation is improper for an appellate court to engage in should not require further discussion.

(Motion for Rehearing at 15)

REASONS FOR GRANTING WRIT

I. STATE COURTS OF FINAL RESORT HAVE ADOPTED STANDARDS CONFLICTING AMONG THE SEVERAL STATES AND CONFLICTING WITH UNITED STATES COURTS OF APPEALS ON WHETHER A DEFENDANT HAS A SIXTH AMENDMENT RIGHT TO QUESTION A KEY WITNESS ABOUT THAT WITNESS' PRIOR UNCHARGED ACTS IN ORDER TO SHOW A MOTIVE TO TESTIFY FAVORABLY FOR THE PROSECUTION.

This case greatly enjoys the orthodox factor used in determining what cases merit review: state courts have adopted conflicting standards about whether a defendant has a Sixth Amendment right to cross-examine a key witness on that witness' prior uncharged acts.[2] Federal

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[2] Several states hold that the confrontation clause allows defendants to inquire into uncharged acts: *Rincher v. State*, 632 So.2d 37(Ala.Crim.App. 1993), *cert. den.* 632 So.2d 41(Ala. 1994); *Whitton v. State*, 479 P.2d 302 (AK 1970); *State v. Torres*, 97 Ariz.

courts are also divided on the issue.[3] Finally, because federal law allows state prisoners to seek habeas relief in federal court, there are conflicts between federal reviewing courts and state courts.[4]

364, 400 P.2d 843 (1965); *People v. Clark*, 63 Cal.2d 503, 47 Cal.Rptr. 382, 407 P.2d 294 (1965); *People v. Jones*, 635 P.2d 907 (Colo.App. 1981), *aff'd en banc* 675 P.2d 9 (Colo. 1984); *Ford v. United States*, 549 A.2d 1124 (D.C.App. 1988); *Brown v. State*, 74 Md.App. 414, 538 A.2d 317 (1988); *State v. Zwillman*, 112 N.J.Super. 6, 270 A.2d 284 (1970), *certif. den.* 57 N.J. 603, 274 A.2d 56 (1971); *People v. Allen*, 67 A.D.2d 558, 416 N.Y.S.2d 49 (1979), *aff'd* 50 N.Y.2d 898, 430 N.Y.S.2d 588, 408 N.E.2d 917 (1980); *State v. Wilson*, 311 N.C. 117, 316 S.E.2d 46 (1984); and *Martinez v. State*, 904 P.2d 138 (Ok.Crim.App. 1995). Other states refuse to permit inquiry into uncharged acts: *State v. Moye*, 214 Conn. 89, 570 A.2d 209 (1990); *People v. O'Dell*, 84 Ill.App.3d 359, 39 Ill.Dec. 830, 405 N.E.2d 809 (1980); *Hansford v. State*, 490 N.E.2d 1083 (Ind. 1986); *State v. Cormier*, 535 A.2d 913 (Me. 1987); *State v. Brandon*, 264 Mont. 231, 870 P.2d 734 (1994); *State v. Overby*, 497 N.W.2d 408 (N.D. 1993); *State v. Shabata*, 678 P.2d 785 (Ut. 1984); and *State v. Benn*, 120 Wash.2d 631, 845 P.2d 289 (1993). Annotation, *Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity not having resulted in arrest or charge*, 24 A.L.R.4th 333 (1983). Mississippi was firmly in the category allowing some inquiry into prior acts, *Suan v. State*, 511 So.2d 144 (Miss. 1987). However, during the pendency of this case, the Supreme Court decided *Manning v. State*, 726 So.2d 1153 (Miss. 1998), which held that a witness should not be cross-examined about the witness' involvement in other crimes.

[3] The Fifth and Ninth Circuit Courts of Appeals have held that uncharged acts may be inquired into: *United States v. Croucher*, 532 F.2d 1042 (5th Cir. 1976); *United States v. Brooke*, 4 F.3d 1480 (9th Cir. 1993). The Sixth Circuit has held the opposite: *United States v. Christian*, 786 F.2d 203 (6th Cir. 1986).

[4] The First Circuit has held in a habeas proceeding that prior charged acts may be inquired into, but not the penalty avoided by accepting a plea bargain, *Brown v. Powell*, 975 F.2d 1 (1st Cir. 1992). This conflicts with *State v. Rodriguez*, 262

This complete range of conflicts undermines the crucial role the Constitution plays in our nation's life. *See, Nichols v. United States*, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994) (certiorari granted to resolve conflicts arising under Sixth Amendment among state courts and among federal courts). As our nation's *ur* text, it is the instrument which binds us into a polity honoring principles which are not aspirational but upon which we rely each day. Typically, the Constitution quietly allows us to go about our associational lives without worry that some authority will find our business, or associates, offensive. It also provides the means for the wrongly accused to be delivered, and the rightly accused not to be convicted without the state having proved its case.

The Sixth Amendment is indispensable to the credibility of the criminal justice system's results. The right to sift the state's key witness' past to ferret out the witness' motive to lie or to show the witness' susceptibility to the will of the State's officers can only increase the reliability of a jury's fact finding and support our courts' credibility.

The Court has never considered the precise question raised here, *see Lindh v. Murphy*, 117 S.Ct. 2059 (1997) (petitioner raised issue in state court, but case arose on issue relating to post-conviction relief statute, not merits). Nevertheless, because the right to inquire into past acts is

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N.J.Super. 564, 621 A.2d 534 (1993), which case stated that the sentencing possibilities avoided by the witness were relevant motive evidence. Also, on a habeas petition, the Fifth Circuit has applied a standard favoring admissibility of prior acts evidence in *Carrillo v. Perkins*, 723 F.2d 1165 (5th Cir. 1984); on direct appeal, the state appellate court in that case had drawn the line at permitting inquiry into past arrests, *Carrillo v. State*, 591 S.W.2d 876 (Tex.Crim.App. 1979).

well within the general thrust of the Court's Sixth Amendment jurisprudence, the Mississippi Court's result also should be reviewed because it "represent[s] a significant departure from [the Court's] Confrontation Clause jurisprudence." *Lilly v. Virginia*, 119 S.Ct. 1887, 1893 (1999).

Aside from the inherent importance of our rights under the Sixth Amendment, see, *e.g.*, *Danner v. Kentucky*, 119 S.Ct. 529 (1998) (Scalia, joined by Thomas, JJ., dissenting from refusal of writ, "the more reprehensible the charge, the more the defendant is in need of all constitutionally guaranteed protection for his defense."), the Court should hear this case to ensure that a defendant has some power to check systemic abuse of and by informants.

Like conspiracies, where, as in this case, the government and informant had an informal arrangement, or at least the informant so believed, there is never much in the way of direct evidence. See, generally, Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 Hast.Con.L.Q. 81 (1994); Haglund, *Impeaching the Underworld Informant*, 63 So.Cal.L.R. 1405 (1990).

And the advocate's armamentarium contains few effective means of countering either a prosecutor's misuse or an informant's manipulation. The Sixth Amendment embodies fundamental concepts of fairness at odds with the use of informants:

> President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you disagree. You could not

> sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this country, if someone . . . accuses you, he must come up in front. He cannot hide behind the shadow."

Coy v. Iowa, 487 U.S. 1012, 1017-18, 108 S.Ct. 2798, 2801, 101 L.Ed.2d 857 (1988). This alone suggests that the confrontation clause is the "great engine" for checking manipulative or manipulated informants.

Promoting the reliability of fact finding is a core policy underlying the Sixth Amendment. *Accord, Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (cross-examination helps assure the accuracy of fact finding and any curb calls into question the integrity of that process). Tenner does not suggest that cross-examination is a complete solution to the problem of informer misuse. But each case must turn on its own facts and law without regard to other tools used to fashion a more perfect criminal justice system.

All recognize that for certain crimes, such as conspiracies and "victimless" crimes, like drug dealing, there are few means to "detect" the crime. But crediting the informant's testimony in this case suggests that our own credulousness is part of the problem. Not only were the handler's and informer's hands filled with conflicting interests as in most such cases, but the jury knew that either Ellis was lying or Cox was – a situation potentially subjecting Cox to discipline – and the quoted portions of Ellis' testimony do not fully convey Ellis' cognitive impairments as does the full transcript.

In this case, crediting Ellis' testimony depended less on the informer's ability to lie convincingly than on the jury's readiness to be deceived. Partly, this stems from an

interest in believing the goods which have been purchased are as warranted. Partly, our suspension of disbelief involves a desire to believe what we hear is the "inside scoop." One example suffices: what lawyer would not submit to an episode of unanesthetized dentistry to be the fly on the wall during the Court's conferences?

Cross-examination is the means to present evidence causing a jury to bethink itself that the state's case may be tainted, having too many turbid undercurrents in the facts relating to the handling of the informer and the power dynamic between the state and its informer. That is why this case is of national importance.

Turning to the Court's jurisprudence, because the main function of the confrontation clause is the examination of witnesses appearing personally before the accused, generally cases separate into a "scope of cross-examination" category and an "out-of-court statement" branch. *Coy*, 487 U.S. at 1016, 108 S.Ct. at 2800. This case involves both main branches. The issue discussed in this section relates to the "scope" series of cases.

In *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Court considered whether the trial court's ruling that Alford could not inquire into the informant's place of residence and custodial status infringed Alford's Sixth Amendment right to confrontation. The trial judge thought that Alford only could impeach the witness by showing a conviction: "[Y]ou can't merely show that he is detained or in charge of somebody. Everybody is presumed to be innocent until proven guilty." *Id.* at 689, 51 S.Ct. at 218-219. Alford was not seeking to prosecute the witness, only suggest that custody was a powerful motivator.

The Court of Appeals had dismissed Alford's attempted cross-examination as a "fishing expedition." The incredulous Court said that "[t]o say . . . prejudice can be established *only* by showing that the cross-examination, if pursued, would *necessarily* have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." *Id.* at 692, 51 S.Ct. at 219 (emphasis supplied).

As to whatever the facts relating to the witness' custody might be, the Court said:

> [It was] not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States *which was conducting the present prosecution.* (citations omitted)

Id. at 693, 51 S.Ct. at 220 (emphasis supplied). Alford was entitled to show the imbalance in the witness' bargaining position to suggest the witness' testimony "was affected by fear or favor growing out of his detention." *Id.*

Summing up, the *extent* of cross-examination is always within the sound discretion of the trial court. However, the *scope* of cross-examination cannot be limited to preclude examining the witness about residence and custody:

> [N]o obligation is imposed on the court . . . to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond

> the bounds of proper cross-examination merely to harass, annoy or humiliate him.

Id. at 694, 51 S.Ct. at 220.

Perhaps the leading "scope" case is *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In that case, Davis was identified by sixteen year old Richard Green as one of two men he had chatted with near where a stolen safe was later discovered. Green's evidence was crucial to placing Davis at the scene and identifying him as the man with the crowbar. *Id.* at 310, 94 S.Ct. at 1107.

Green, however, had been adjudicated a delinquent for two burglaries. The defense lawyer wished to show that Green was on probation and that his testimony might have been the result of fear that his probation might be revoked. Because Alaska law forbade revealing Green's juvenile record, the trial court refused to permit cross-examination about the boy's burglaries or probationary status.

The Alaska Supreme Court upheld the conviction because Davis had been able to "adequately" cross-examine the boy. The Court disagreed, again noting that the *extent* of cross-examination is always within the broad discretion of the trial court, but that the scope of cross-examination typically consists of two approaches:

> One way of discrediting the witness is to introduce evidence of a prior criminal conviction. . . . By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing

> possible biases, prejudices, or ulterior motives of the witness. . . .

Id. at 316, 94 S.Ct. at 1110.

Restating *Alford*'s holding, the Court said that it could not speculate as to whether the jury, the sole judge of credibility, would have placed much weight on the facts which might have been revealed by the cross-examination, but that Davis was entitled, under the Sixth Amendment, to place such facts before the jury. The Court also emphasized that this result is most compelling in cases where the witness is key to the prosecution. *Id.* at 317, 319, 94 S.Ct. at 1111, 1112.

Finally, the Court said that it is not enough Davis was allowed to ask Green *whether* he was biased:

> [C]ounsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on . . . an apparently blameless witness. . . . "

Id. at 318, 94 S.Ct. at 1111.

Two other cases are of especial relevance to the case *sub judice*, *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), and *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). Robert Van Arsdall was convicted of murdering Doris Epps during a New Year's party. The party was held in neighboring apartments belonging to Fleetwood and Pregent.

Epps was last seen alive sleeping it off on Pregent's sofa bed. Van Arsdall showed up at Fleetwood's door spattered with blood and holding a bloody knife. Police

were summoned and they found Pregent asleep on the blood-stained sofa bed and Epp's body on Pregent's kitchen floor.

Van Arsdall sought to impeach Fleetwood about the dismissal of a criminal charge after Fleetwood agreed to talk to the prosecutor about Epps' murder. Out of the jury's presence, Fleetwood acknowledged that the charge was dropped after he agreed to meet with the prosecutor. He denied the agreement had influenced his testimony and the trial court denied Van Arsdall an opportunity to cross-examine him about it. *Van Arsdall*, 475 U.S. at 674-77, 106 S.Ct. at 1432-34.

Citing *Davis*, the Court held that the trial court's ruling prohibiting *all* cross-examination as to motive and bias violated Van Arsdall's Sixth Amendment rights. *Id.* at 679, 106 S.Ct. at 1435. "We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness. . . . " *Id.* at 680, 106 S.Ct. at 1436.

Relying on *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the *Van Arsdall* Court said that an otherwise valid conviction should not be lightly thrown away *if* the reviewing court "may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436. The Court announced five non-exclusive factors for reviewing courts to consider:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an

> error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include [1] the importance of the witness' testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross-examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438.

Olden was a *per curiam* summary reversal. Olden and Harris, both African-Americans, were indicted for, *inter alia*, rape of one Starla Matthews who was white. Matthews claimed to have adventured into a juke joint, where she became intoxicated. Unable to locate the friend with whom she had ridden to the club, Olden and Harris offered to drive her to this friend, purporting that the friend had been in an accident. Thereafter, according to Matthews' several stories, she either was raped by two men, four men, or only by Olden.

At her request, Olden and Harris dropped her off at Bill Russell's house. Russell and Matthews, though at the time married to others, were having an affair and cohabiting. Russell was of African descent. *Id.* at 228-31, 109 S.Ct. at 481-82.

The defense wished to bring out the facts of the affair and cohabitation as motive evidence. The trial court refused; the Kentucky Court of Appeals explained the evidence was properly excluded under Kentucky's version of Rule 403 because the matter of race could " 'create[ ] extreme prejudice against Matthews.' " *Id.* at 231, 109 S.Ct. at 482.

The Court held that the Kentucky court had failed to accord proper weight to Olden's confrontation right:

> [W]ithout acknowledging the significance of, or even adverting to, petitioner's constitutional right to confrontation, the court held that petitioner's right to effective cross-examination was outweighed by the danger that revealing Matthews' inter-racial relationship would prejudice the jury against her. While a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as "harassment, prejudice, confusion of the issues, the witness's safety or interrogation that [would be] repetitive or only marginally relevant" (citation omitted), the limitation here was beyond reason.

Id. at 232, 109 S.Ct. at 483.

The Mississippi Court in this case also failed to mention the Sixth Amendment. If evidence of an inter-racial relationship is appropriate matter for cross-examination into bias, it is very hard to see how facts relating to uncharged crimes is not also proper grist for the jury's discerning of bias or motive. In *Van Arsdall,* Fleetwood got his drunk driving charge dropped in return for information. That was an existing charge, but in the context of seeking evidence of motive or bias, there is no obvious reason to draw a distinction between charged and uncharged crimes. It may be that evidence of uncharged crimes is more important because, as here, the prosecutor can give the appearance of a penitent witness having already been convicted, countering the conviction's general impeachment, while secretly retaining other potential charges as leverage.

As in *Van Arsdall*, Tenner was precluded from *all* questioning about Ellis' motive. As in *Davis*, Tenner was able to ask whether Ellis lied, but he was not able to show the jury any facts, other than his lawyer's having received a call from Ellis, which suggested that Ellis had a motive to lie.

Cotton averred at trial that the State could do nothing for Ellis as he had already been convicted. Whether this is true or not, the proper measure of a witness' motive is not the State's perception, but the *witness'* expectations, however subjective. The state is not seeking leniency, the witness is. *State v. Little*, 87 Ariz. 296, 350 P.2d 756 (1960) (witness' expectation, even if mistaken, unreasonable, or not based on prosecutorial conduct or words, is proper test); *State v. Rodriguez*, 262 N.J.Super. 564, 621 A.2d 532 (1993) (codefendant's lawyer caused codefendant to offer inculpating testimony in hope that prosecutor's unexpected testimonial windfall would result in reduced sentence). In another context, the Court has recognized that "[t]he police need not tell a person who is in custody that his statements may gain him leniency in order for the suspect to surmise that speaking up, and particularly placing blame on his cohorts, may inure to his advantage." *Lilly*, 119 S.Ct. at 1901.

The Mississippi Court held that general impeachment was good enough: "A careful review of the record reveals that the jury was more than amply aware of any potential bias, motive, or interest Ellis may have harbored. It was presented to the jury that Ellis was a convicted felon . . . and that he was a confidential informant for the Mississippi Bureau of Narcotics. . . . " As in *Olden*, the Mississippi Court failed to properly weigh Tenner's confrontation right. Despite the Mississippi Court's "careful

review of the record," that court was factually incorrect that Tenner was able to inquire into Ellis' past drug dealing: "While on cross-examination . . . Ellis was questioned regarding whether any additional drug purchases were made by him . . . to which the state objected as to relevancy. . . . The trial court allowed the question."

The trial court sustained the state's objection relating to inquiry into Ellis past dealings twice. The Mississippi Court's conflating two separate lines of questions, one relating to Ellis' own past dealing, the other relating to his drug purchases for the State, cannot have been inadvertent. Finding that "[a]ny alleged curtailment by the trial court affecting or limiting Tenner's inquiry into Ellis' relationship with law enforcement is unsupported by the record" is patently incorrect.

That the Mississippi Court was "not persuaded that additional inquiry by Tenner would have produced substantial interest, motive, or bias not already established" cannot foreclose Tenner's Sixth Amendment right to present such information to the jury. "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." *Alford*, 282 U.S. at 692, 51 S.Ct. at 219.

The Court in *Alford* did not need to answer the question of how far an inquiry can go before the confrontation clause begins to infringe the witness' Fifth Amendment rights. Preserving a witness' Fifth Amendment rights by limiting the *extent* of cross-examination is a function of an appropriate balance of competing interests. Similarly, a trial court's broad discretion in limiting the extent of

cross-examination on the basis of harassment, prejudice, repetition, and confusion of the issues, is a firm barrier to inquiry into acts so remote in time as to be irrelevant

The "host of factors" indicate that the trial court's ruling was not harmless. The "full potential" of the testimony would have been that Ellis had sold drugs many times before in Jefferson County, Mississippi, and, as he testified later, that the "narks" had been after him for a long time before he pleaded guilty and agreed to set up Michael Tenner.

The State could still seek other indictments with penalties beyond eight years. At seventy years of age, Ellis knew that any greater sentence than that offered could amount to a life sentence. Ellis was the only witness who identified Tenner as the seller. Ellis' testimony was not merely cumulative. The only other evidence was the presence of three one-hundred dollar bills on Tenner's person. However, in the face of a plausible explanation, the circumstantial evidence of the three bills should not be viewed as so thoroughly probative as to obviate the need for other evidence. The error cannot be said to be harmless beyond a reasonable doubt.

II. TENNER'S RIGHTS TO DUE PROCESS AND CONFRONTATION WERE VIOLATED BY THE MISSISSIPPI COURT OF APPEALS' AFFIRMING THE CONVICTION ON THE BASIS OF A HEARSAY CONFESSION THE JURY NEVER HEARD.

There is a threshold question about the preservation of this error. In the conventional sense, Tenner had no opportunity to raise this issue prior to the Court of Appeals' announcing its decision. The Court has never allowed its jurisdiction to be foreclosed because the error

did not arise in the trial court. When the act alleged as error is that of the highest state court hearing the case, coming at the end of the proceedings, where the defendant no longer may make a record, "it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved . . . could not come here." *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 640 (1917); see *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85, n. 9, 100 S.Ct. 2035, 2043, n. 9, 64 L.Ed.2d 741 (1980).

Tenner contends that the Mississippi Court of Appeals substantially relied on hearsay testimony in finding that Tenner was Ellis' supplier. Before an appellate court, Tenner could not offer other evidence or cross-examine the witness. Before setting out the Court's "hearsay" branch of confrontation jurisprudence, Tenner notes that the type of hearsay relied on by the Court of Appeals is inadmissible.

Mississippi has adopted rules substantially identical to the Federal Rules of Evidence. Testimony about Tenner's prior bad acts would be character evidence, Miss.R.Evid. 404. Rule 608, Miss.R.Evid., permits evidence of specific acts only if probative of a witness' truthfulness. Evidence of prior sales by Tenner to Ellis has nothing to do with veracity.

Under Rule 404(b), evidence of earlier drug dealing is inadmissible as substantive evidence of guilt. However, prior acts evidence can be used for other reasons: to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

None of these categories are relevant to this case: there was no question the sale was intended. Nor was Tenner's motive or opportunity in question; if he wished to sell the drug, he had the opportunity. This case was not

about preparation, plan, or knowledge. It was about a single sale of cocaine. Nor was Tenner's identity in question; both men knew each other by sight. The Court should understand that this case arose in rural Mississippi. Just after the district attorney asked the venire if anyone knew James "Judge" Ellis, he blurted, "Okay. We've got a lot of hands here." (T. 19) Surely not everyone raising a hand was a drug dealer.

Bad acts evidence, to be admissible in Mississippi, must pass muster under one of Rule 404's avenues. *Bounds v. State*, 688 So.2d 1362, 1370 (Miss. 1997). In *Burrell v. State*, 727 So.2d 761 (Miss.App. 1998), an *informant* testified that he "really couldn't count the times" he had bought drugs from the defendant. The trial court allowed the testimony not as prior acts evidence but as evidence of the defendant's identity. The Court of Appeals reversed, saying there was no question as to the defendant's identity and the testimony was inadmissible prior acts evidence. *Id.* at 768.

Mississippi has previously permitted *informants* to testify about earlier sales to show an intent to distribute, but only so long as the testimony is accompanied by a limiting instruction as to intent. *Smith v. State*, 656 So.2d 95 (Miss. 1995). Research revealed no cases where Mississippi has allowed hearsay testimony about such acts. Also, Tenner was not indicted for intending to distribute, but only for a single sale of cocaine.

Rule 404 exists to keep evidence out which merely predicts that, the defendant having done an unlawful act in the past, the defendant has done the act charged. The Mississippi court's decision demonstrates that the affect of past acts evidence is no less pernicious on judges than it is on juries. Also, Ellis' admission that he had dealt

drugs with Tenner in the past, if Ellis said that, merely demonstrates that the State had many more crimes with which to prosecute Ellis if he did not produce the required testimony.

The drug agent's statement is a type of hearsay which the Sixth Amendment does not permit. If Cotton's hearsay testimony would have been inadmissible before the jury, it is very hard to see how an *appellate* court can rely on it consistent with Tenner's Sixth and Fourteenth Amendment rights.

In *Mattox v. United States*, 156 U.S. 237, 243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895), the Court recounted the historical background of the Sixth Amendment:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Since then, the Court has been at once careful to reject the idea that the confrontation clause should be confined to situations analogous to *ex parte* affidavits, and also to view such analogous situations with suspicion. *Lilly*, 119 S.Ct. at 1895, 1900. Because the "out of court" statement cases arise in a variety of circumstances, the Court has engaged in the common law tradition of carefully assessing facts in light of both past experience and

changing conditions. *See Ohio v. Roberts*, 448 U.S. 56, 64-65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597 (1980).

Several cases have concerned prior testimony sought to be used in a separate present proceeding. *E.g., Motes v. United States*, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900); *Mattox, supra; Roberts, supra; Pointer, supra; California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Other cases involved intercepted statements made in the course of a conspiracy. *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986); *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Recently, responding to a modern recognition of the problem of child sex abuse, the Court has dealt with situations involving child witnesses. *E.g., White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992); *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

Another series of cases, those relevant to this one, involve testimony at trial, or the introduction of prior statements, by a law enforcement officer purporting to reproduce a third person's "confession" inculpating the defendant. *Lilly, supra; Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); *Tennessee v. Street*, 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). There is a related series of cases where, at a joint trial, the state has sought to introduce a non-testifying codefendant's confession. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987); *Gray v. Maryland*, 118 S.Ct. 1151 (1998).

The confrontation clause and the hearsay rule "are generally designed to protect similar values, [but] it is

quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay. . . . " *Green*, 399 U.S. at 155, 90 S.Ct. at 1933. Generally, hearsay is excluded for obvious reasons: the declarant could have been lying; the events may have been misperceived; memory may be faulty; and the listener may have misunderstood or taken the declaration out of context. In-court confrontation minimizes the hearsay dangers through several means: the oath, the impressive seriousness of trials, and the jury's observation of the witness' demeanor, especially on cross-examination. *Williamson v. United States*, 512 U.S. 594, 598, 114 S.Ct. 2431, 2434, 129 L.Ed.2d 476 (1994).

In-court confrontation is a "functional right" that promotes the reliability of the jury's truth seeking function. This jury duty is "uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee*, 476 U.S. at 540-41, 106 S.Ct. at 2062. As in *Lee* and *Douglas*, in this case the State, in the person of its Court of Appeals, used hearsay evidence as substantive evidence against Tenner. Before that court, no cross-examination is available. As in *Lee*, "[t]he danger against which the Confrontation Clause was erected – the conviction of a defendant based, at least in part, on presumptively unreliable evidence – actually occurred." *Id.* at 543, 106 S.Ct. at 2063.

Hearsay evidence is admissible under certain circumstances. However, those circumstances must either be of a kind rendering cross-examination irrelevant or through which it is impossible to replicate the circumstances of the declaration, e.g., a dying declaration, coconspirator

statements made during the conspiracy. The Court usually denominates these exceptions as "firmly rooted" ones. Failing that, the hearsay statement must "possess indicia of reliability by virtue of [the declaration's] inherent trustworthiness, not by reference to other evidence at trial." *Wright*, 497 U.S. at 822, 110 S.Ct. at 3150.

There is no evidence here that the drug enforcement agent's statements bear any indicia of reliability. His statement was prototypical hearsay which does not fall into any "firmly rooted" exception. As the Court has held, that a person's statement may be used to inculpate that person, does not make it admissible against a different person merely because the overall statement is against the declarant's penal interest. *Williamson*, 512 U.S. at 600-01, 114 S.Ct. at 2435.

The drug agent's statement was the most suspect variety: purporting to be information gained during the course of interrogating a person seeking leniency. In this case, the state was involved in actually producing the statement, it was not made in furtherance of the conspiracy, and the statement had never been, nor could it be, tested by cross-examination. In other words, this case implicates "the core concerns of the old *ex parte* affidavit practice." *Lilly*, 119 S.Ct. at 1900.

The use, by a trial court, of an "untested confession" inculpating another besides the declarant violates the other person's Sixth Amendment rights. *Lilly*, 119 S.Ct. at 1901. That is, even if the hearsay testimony were admissible under an exception, the Sixth Amendment precludes its use in these circumstances. *Wright*, 497 U.S. at 814, 110 S.Ct. at 3146. The use of untested inculpating statements by an appellate court not only violated Tenner's Sixth Amendment rights but his right to proper process before

the courts of Mississippi guaranteed him by the Fourteenth Amendment:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black . . . identified these rights as among the minimum essentials of a fair trial:
>
> > "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (citations omitted)

Chambers, 410 U.S. at 294, 93 S.Ct. at 1045, *quoting In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed.2d 682 (1948). *See, Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) (long-accepted notions of fair procedure include notice and confrontation where governmental action affects liberty or property right).

The process due a criminal defendant has always included proper notice of the charges to defend against. *The Schooner Hoppet v. United States*, 7 Cranch 389 (1817). In *The Hoppet*, Chief Justice Marshall said,

> The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved,

> and state such a crime as will justify the judgment to be pronounced.

Id. at 394.

The Mississippi *appellate* court found Tenner culpable of acts for which he was never charged: "Previous information given by Ellis indicated that Ellis had purchased cocaine from Tenner before and that Tenner was Ellis's supplier." Against this accusation, Tenner had no opportunity to defend. Nor, under the indictment handed down by the grand jury, was he required to do so.

The Mississippi Court of Appeals' action was so far outside the bounds of ordinary due process that the Court should hear and decide this case as a supervisory warning that the problem of drugs in our society, great as it is, cannot justify a "repeal" of the Fourteenth Amendment by judicial fiat.

Respectfully submitted,

T. Jackson Lyons
Attorney at Law
Standard Life Building
206 West Pearl Street, Suite 711
Jackson, Mississippi 39201
Tel. (601) 352-0330
Fax. (601) 969-1402
MSB #8988
Counsel of Record for Petitioner

IN THE SUPREME COURT OF MISSISSIPPI

NO. 96-CT-00930-SCT

MICHAEL TENNER

v.

STATE OF MISSISSIPPI

ORDER

(Filed May 13, 1999)

This matter came before the Court on the Petition for Writ of Certiorari filed by Michael Tenner. The Court has considered the petition and finds that it should be denied.

IT IS, THEREFORE, ORDERED that the Petition for Writ of Certiorari filed by Michael Tenner be, and hereby is, denied.

SO ORDERED this, the 4th day of May, 1999.

/s/ Lenore L. Prather
LENORE L. PRATHER,
CHIEF JUSTICE
FOR THE COURT

TO DENY: Prather, C.J., Sullivan and Pittman, P.JJ., Banks, McRae, Smith, Mills, Waller, and Cobb, JJ.

SUPREME COURT AND COURT OF APPEALS
STATE OF MISSISSIPPI
CHARLOTTE B. WILLIAMS, CLERK
THIRD FLOOR GARTIN BUILDING
450 HIGH STREET
POST OFFICE BOX 249
JACKSON, MISSISSIPPI 39205-0249
TELEPHONE: (601) 359-3694
FACSIMILE: (601) 359-2407

Kathy Gillis — Chief Deputy

Bettye Malanchak — Deputy Clerk

February 9, 1999

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 9th day of February, 1999.

Court of Appeals Case # 96-KA-00930-COA
Trial Court Case # 2950

Michael Tenner v. State of Mississippi

Motion for rehearing denied. McMillin, P.J., Irving and Lee, JJ., not participating.

NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 96-KA-00930 COA

MICHAEL TENNER **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:

07/03/96

TRIAL JUDGE:

HON. LAMAR PICKARD

COURT FROM WHICH APPEALED:

JEFFERSON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

BOBBY L. COX
WILLIAM CARL MCGEHEE JR.
T. JACKSON LYONS

ATTORNEY FOR APPELLEE:

DEIRDRE MCCRORY

DISTRICT ATTORNEY:

ALEXANDER C. MARTIN

NATURE OF THE CASE:

CRIMINAL-FELONY

TRIAL COURT DISPOSITION:

UNLAWFUL SALE OF COCAINE:
SENTENCED TO 30 YRS WITH THE MDOC;

DISPOSITION:

AFFIRMED – 9/29/98

MOTION FOR REHEARING FILED:

CERTIORARI FILED:

MANDATE ISSUED:

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Michael Tenner appeals his conviction of unlawful sale of cocaine raising the following issues as error:

I. WHETHER, IN CASES OF RECANTED TESTIMONY BY THE STATE'S KEY WITNESS, MISSISSIPPI SHOULD WITHDRAW FROM THE CONFUSION OCCASIONED BY ASSESSING RECANTED TESTIMONY UNDER THE STANDARD FOR GRANTING NEW TRIALS ON THE BASIS OF NEWLY-DISCOVERED EVIDENCE, AND EMBRACE A STANDARD, FOLLOWED BY A MAJORITY OF THE FEDERAL COURTS, WHERE A NEW TRIAL SHOULD BE GRANTED IF A PRIMA FACIE SHOWING OF FALSE TESTIMONY IS MADE AND THE CHANGED TESTIMONY IS SO MATERIAL THAT IT MIGHT YIELD A DIFFERENT RESULT IF TRIED ANEW.

II. WHETHER THE TRIAL COURT COMMITTED ERROR OF A CONSTITUTIONAL DIMENSION IN FAILING TO ALLOW AN EXPLORATION INTO THE STATE'S KEY WITNESS'S PAST ACTIONS WHICH COULD HAVE INDICATED EITHER BIAS

OR THE WITNESS'S INTEREST IN DELIVERING TESTIMONY FAVORING THE PROSECUTION.

III. WHETHER THE TRIAL COURT ERRED IN PERMITTING A STATE'S WITNESS TO OPINE REPEATEDLY, WITHOUT ANY PREDICATE, THAT THE WITNESS HEARD, VIA A "BODY WIRE" ON THE STATE'S KEY WITNESS, A CONVERSATION WITH A PERSON "WHO WE THOUGHT WAS MICHAEL TENNER."

Finding no error, we affirm.

FACTS

During the evening hours of November 17, 1995, members of the Jefferson County Sheriff's Office and the Mississippi Bureau of Narcotics conducted an undercover "buy" of a controlled substance from Michael Tenner. James Ellis, a confidential informant, met with Sergeant James Cotton of the Mississippi Bureau of Narcotics at a staging area in the Tennerville community in Jefferson County just prior to the "buy." Ellis's car and person were searched, and he was fitted with a recording device commonly called a "wire." The serial numbers and photocopies of three $100 bills used to facilitate the "buy" were recorded by Agent Cotton and given to Ellis. Ellis was instructed to locate Michael Tenner and purchase a "quarter" of cocaine or $300 worth. Previous information given by Ellis indicated that Ellis had purchased cocaine from Tenner before and that Tenner was Ellis's supplier.

After unsuccessfully attempting to contact Tenner at his residence by car phone, Ellis spotted Tenner at the Tennerville Store and relayed the information over the "wire" to Agent Cotton. Ellis then proceeded to purchase

a quarter of cocaine from Michael Tenner. Upon completion of the illegal purchase, Ellis met Agent Cotton a short distance from the Tennerville Store. Ellis turned the cocaine over to Agent Cotton and positively identified Michael Tenner as the seller. Agent Cotton and Sheriff Walker then returned to the Tennerville Store and arrested Michael Tenner. A search of Tenner's person revealed the three $100 dollar bills previously recorded by Agent Cotton.

At trial, Ellis was called to testify against Michael Tenner regarding the November 17, 1995 illegal sale of cocaine. Ellis testified to the events of that evening in detail and positively identified Michael Tenner as the person who sold him cocaine. Tenner was convicted of the unlawful sale of cocaine.

Tenner filed a motion for a new trial and a hearing was held on August 15, 1996. At the hearing, Ellis testified that he had incorrectly identified Michael Tenner as the person who had sold him cocaine. Ellis explained in support of his recantation that his eyesight was bad and that his memory was inadequate to recall the details of the sale on November 17, 1995. When asked why Ellis had testified against Tenner at trial, Ellis simply stated he was scared, but could not give any details or elaborate further. The truthfulness and veracity of Ellis's recanting testimony was called into doubt by the court and Tenner's motion for new trial was denied.

ANALYSIS

I.

WHETHER, IN CASES OF RECANTED TESTIMONY BY THE STATE'S KEY WITNESS, MISSISSIPPI SHOULD WITHDRAW FROM THE CONFUSION OCCASIONED BY ASSESSING RECANTED TESTIMONY UNDER THE STANDARD FOR GRANTING NEW TRIALS ON THE BASIS OF NEWLY-DISCOVERED EVIDENCE, AND EMBRACE A STANDARD, FOLLOWED BY A MAJORITY OF THE FEDERAL COURTS, WHERE A NEW TRIAL SHOULD BE GRANTED IF A PRIMA FACIE SHOWING OF FALSE TESTIMONY IS MADE AND THE CHANGED TESTIMONY IS SO MATERIAL THAT IT MIGHT YIELD A DIFFERENT RESULT IF TRIED ANEW.

As Tenner's first assignment of error, he maintains that Mississippi's current standard of assessing recanting testimony as applied under the newly discovered evidence standard should be supplanted by the *Larrison* standard, a standard applied by a majority of federal courts of appeals. *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928). Tenner asserts that the current standard as applied in Mississippi allows inconsistent interpretations among the lower courts. We are not inclined to do so, nor are we persuaded by this assignment of error.

Mississippi's standard for assessing recanted testimony under the newly discovered evidence standard is well established and more than adequately provides our lower courts the necessary framework to properly apply a standard of assessing recanted testimony without the inconsistencies as alleged by Tenner. Newly discovered evidence will warrant a new trial if there is the probability that a different result or verdict will be produced

when the evidence is introduced in a new trial. In addition, the proponent has the burden to show: 1) that the evidence was discovered subsequently to trial, 2) that the evidence would not have been discovered before trial through the exercise of due diligence, 3) that the new evidence is material to the issue, and 4) that the new evidence is not merely cumulative or impeaching. *Smith v. State*, 492 So.2d 260, 263 (Miss. 1986). This assessment is measured by the preponderance of evidence standard. *McClendon v. State*, 539 So.2d 1375, 1377 (Miss. 1989).

In applying the newly discovered evidence standard to recanting testimony we view recanting testimony as "exceedingly unreliable, and is regarded with suspicion; and it is the right and duty of the court to deny a new trial where it is not satisfied that such testimony is true." *Bradley v. State*, 214 So.2d 815, 817 (Miss. 1968). To do otherwise would allow our courts to be undermined by a corrupt witness's recanting testimony and "cause the issue to oscillate at will." *Id.* Further, the mere fact that a witness gives recanting testimony after trial, standing alone, is an inadequate ground for justifying the defendant's request for a new trial; rather, the inquiry should take into consideration the entire realm of circumstances of the case, including the testimony of the witnesses submitted at the hearing for a new trial. *Id.* This inquiry should yield a determination by the circuit court soundly confident in the original outcome. Only when the recanting testimony undermines this confidence should a new trial be ordered. *Yarborough v. State*, 514 So.2d 1215, 1220 (Miss. 1987). We are bound by the trial court's discretion whether to grant or deny a new trial based on recanting testimony; unless the trial court abused this discretion,

we will not overrule the lower court's decision. *Bradley*, at 817; *Smith v. State*, 492 So.2d 260, 263 (Miss. 1986); *Ormond v. State*, 599 So.2d 951, 962 (Miss. 1992).

In applying this standard to the recanting testimony of Ellis, it is clear at first sight that Ellis's testimony meets the four prongs of the newly discovered evidence standard in *Smith*. However, when assessing recanting testimony under the issue of newly discover [sic] evidence, further analysis into the nature and circumstances of the recanting testimony is required. There can be no doubt that Ellis's testimony weighed heavily upon Tenner's conviction, and although its materiality is without question, the inquiry into the recanting testimony itself does not end upon this conclusion. Given the unique nature of recanting testimony, an assessment of the recanting testimony should be undertaken with a degree of caution and suspicion. The trial court has the right and duty to deny a motion for a new trial based on recanting testimony when the circumstances taken as a whole indicate the recanting testimony is untruthful.

At trial, Ellis testified that he purchased a quarter of cocaine from Michael Tenner during the evening hours of November 17, 1995. The testimony of both Ellis and Tenner reveals that they knew each other by sight and Ellis identified Tenner at trial as the individual who had sold him the cocaine. The record reflects that it was Ellis who sought out local law enforcement and volunteered to undergo the illegal purchase from Tenner. The testimony of Agent Cotton supports Ellis's identification of Tenner as the seller. When asked by Agent Cotton immediately after the sale from whom had Ellis purchased the cocaine,

Ellis stated he purchased the cocaine from Michael Tenner.

At Tenner's hearing for a new trial, Ellis gave recanting testimony. It was then that Ellis testified that he had incorrectly identified Michael Tenner as the person who had sold him cocaine. During the questioning of Ellis at the hearing, Ellis stated that both his eyesight and memory were bad, but failed to provide any detailed explanation as to why he now sought to recant his testimony or from whom he had purchased the cocaine. Upon this testimony and in consideration of Ellis's testimony given at trial, the court concluded that Ellis's veracity at the hearing was inadequate to overcome his previous testimony against Tenner at trial.

Therefore, we cannot find that an abuse of discretion occurred when all the circumstances taken together raise the court's suspicion that the veracity and truthfulness of Ellis's recanting testimony fails to undermine the court's confidence in the original outcome. There is no merit in this assignment of error.

II.

WHETHER THE TRIAL COURT COMMITTED ERROR OF A CONSTITUTIONAL DIMENSION IN FAILING TO ALLOW AN EXPLORATION INTO THE STATE'S KEY WITNESS'S PAST ACTIONS WHICH COULD HAVE INDICATED EITHER BIAS OR THE WITNESS'S INTEREST IN DELIVERING TESTIMONY FAVORING THE PROSECUTION.

Tenner contends the trial court erred in not permitting him to effectively question Ellis's bias and interest in providing testimony favorable to the prosecution. It is

Tenner's position that the line of questioning prevented by the trial court would have revealed a history of career drug dealing by Ellis and the possibility of anticipated favor from law enforcement should friendly testimony concerning Ellis's drug buy with Tenner be provided. The record reflects differently the error assigned by Tenner.

While on cross-examination by defense counsel, Ellis was questioned regarding whether any additional drug purchases were made by him in addition to the instant purchase with Tenner, to which the State objected as to relevancy. At side bar Tenner explained the purpose of the line of questioning. Tenner argued he was attempting to develop any additional information concerning uncharged crimes that would infer a relationship with local law enforcement which would tend to establish Ellis's motive or interest in testifying against Tenner. The trial court allowed the question.

Any alleged curtailment by the trial court affecting or limiting Tenner's inquiry into Ellis's relationship with law enforcement is unsupported by the record. In addition, we are not persuaded that additional inquiry by Tenner would have produced substantial interest, motive, or bias not already established.

It is well settled that the relevancy and admissibility of evidence are within the trial court's discretion and reversal may be had only where that discretion has been abused. *Stromas v. State*, 618 So.2d 116, 119 (Miss. 1993); M.R.E. 103(a), 401. A careful review of the record reveals that the jury was more than amply aware of any potential bias, motive, or interest Ellis may have harbored. It was presented to the jury that Ellis was a convicted felon

presently incarcerated at the Rankin County Correction Facility for the sale of cocaine and that he was a confidential informant for the Mississippi Bureau of Narcotics at the time of the illegal sale between Tenner and himself. This assignment of error is without merit.

III.

WHETHER THE TRIAL COURT ERRED IN PERMITTING A STATE'S WITNESS TO OPINE REPEATEDLY, WITHOUT ANY PREDICATE, THAT THE WITNESS HEARD, VIA A "BODY WIRE" ON THE STATE'S KEY WITNESS, A CONVERSATION WITH A PERSON "WHO WE THOUGHT WAS MICHAEL TENNER."

Tenner's final assignment of error is aimed at the admission of testimony given by Agent Cotton concerning voices transmitted over the "wire" during the drug buy. On appeal, Tenner maintains that the testimony given by Agent Cotton amounted to an opinion identifying Tenner's voice as the seller without having first laid the proper predicate as required in *McDavid v. State*, 594 So.2d 12 (Miss. 1992). However, at trial Tenner's objection to the testimony of Agent Cotton concerned its admissibility under the best evidence rule and not its admissibility under *McDavid*. Consequently, Tenner is procedurally barred from raising a different objection on appeal. *See Lester v. State*, 692 So.2d 755, 772 (Miss. 1997) (stating that objection on one ground at trial waives all other grounds for an objection on appeal). When a defendant raises a single objection at trial, it cannot be subsequently enlarged on appeal to encompass objections waived at trial. *Brown v. State*, 682 So.2d 340, 350 (Miss.

1996); *McGarrh v. State*, 249 Miss. 247, 148 So.2d 494, 506 (Miss. 1963).

Despite the procedural bar, Tenner's assignment of error is also without merit. Tenner maintains that the requisite predicate, as required under *McDavid* was not properly laid prior to Agent Cotton's testimony identifying the seller's voice heard over the "wire" as the voice of Tenner. We are not persuaded. Prior to giving testimony and expressing an opinion that the seller's voice was that of Tenner, an even more "stringent predicate must be laid." *McDavid v. State*, 594 So.2d 12, 15 (Miss. 1992). This predicate has even greater importance when there is no tape recording of the sale to be offered into evidence. Before admitting such opinion testimony, the State must offer testimony by the officer as to "when, where, and under what circumstances" the officer later heard the defendant's voice. *Id.*

Agent Cotton testified that Tenner was arrested a short time after the sale with Ellis took place. Cotton also testified that he transported Tenner to the Jefferson County Sheriff's office where Tenner was processed and read his rights. Tenner waived his rights and consented to questioning by Agent Cotton. Only a few hours transpired between when Agent Cotton first heard the seller's voice over the "wire" and when Agent Cotton began questioning Tenner after arrest. It is readily apparent from the record that sufficient testimony regarding when, where, and under what circumstances Agent Cotton later heard the voice of Tenner was available had Tenner made the proper objection at trial.

In addition to the circumstances readily available in the record concerning Agent Cotton's opinion as to the identity of the seller, Ellis had previously testified that he was equipped with a wire, that he drove to the Tennerville Store, had a brief conversation with Tenner, and purchased cocaine from Tenner at that time. All this occurred while Agent Cotton sat in surveillance listening over the "wire." The effect of Agent Cotton's testimony concerning what he heard over the "wire" and his testimony that he heard a voice "who we thought was Michael Tenner," is cumulative of the testimony already provided by Ellis. Therefore, in addition to the fact Tenner's assignment of error is procedurally barred, it is also without merit. We affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF JEFFERSON COUNTY OF CONVICTION OF THE UNLAWFUL SALE OF COCAINE AND SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ. CONCUR. McMILLIN, P.J., NOT PARTICIPATING.